In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1717

ANTHONY RIZZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the government was required to disclose its informant's threat to give perjured testimony if called as a witness and assumes that such testimony would have been exculpatory; that the full extent of the informant's bargain with the government was unlawfully concealed; that a ninety-day continuance violated petitioner's right to a speedy trial; and that the evidence was insufficient to support petitioner's conviction.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of unlawfully receiving and concealing approximately a half kilogram of heroin, in violation of 21 U.S.C. (1964 ed.) 174. He was sentenced to imprisonment for six years. The court of appeals affirmed without opinion (Pet. App. A).

The evidence showed that shortly before noon on October 21, 1970, State and federal narcotics agents met with Michael Feinberg, an informant. After searching him and his car, the agents gave Feinberg $10,000 with which to purchase narcotics (Tr. 20-21).[1] At noon, Feinberg met co-defendant Louis Fragliossi at the corner of Ridge and Houston Streets in Lower Manhattan (Tr. 22). The informant then drove to a nearby cafe where, minutes later, he was joined by Fragliossi. They conversed briefly and went their separate ways (Tr. 24). Feinberg then met with some of the surveilling agents while others followed Fragliossi to the Italian-American Veterans Club; they observed Fragliossi in conversation with several individuals, including petitioner (Tr. 101, 158).

Both Fragliossi and Feinberg returned to the cafe at 1 p.m. They remained inside for several minutes, after which they left and entered Feinberg's car, parked nearby (Tr. 25-26, 105). At approximately 1:45 p.m. petitioner was observed driving a Cadillac automobile heading toward the place where Feinberg and Fragliossi were waiting in Feinberg's car. Following petitioner's Cadillac was a gold Chevrolet driven by an unidentified individual. Two blocks from Feinberg's car the man in the gold Chevrolet parked and entered petitioner's Cadillac. They proceeded the two blocks to the intersection where Feinberg's car was parked (Tr. 80-81). At that point Fragliossi left Feinberg's vehicle and went across the

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[1] We are lodging with the Clerk of this Court transcripts of the trial ("Tr.") and post-trial hearings, a separately paginated transcript of a pre-trial hearing on the government's motion for a continuance ("H."), a copy of Appellants' Appendix ("A."), and relevant portions of the transcript of a related narcotics trial, *United States* v. *Ralph Cuomo and John Rizzo, Jr.* ("C.").

street to meet petitioner. Petitioner reached out of the window of his car and appeared to give Fragliossi a small object. He then drove away (Tr. 26, 159).

After his brief meeting with petitioner, Fragliossi reentered Feinberg's car and the two drove to the location of the gold Chevrolet. Fragliossi, in possession of the keys to the Chevrolet, opened its trunk and removed a brown paper bag, which he gave to Feinberg (Tr. 82, 177). The package contained 484.5 grams of heroin, 100% pure (Tr. 115). Fragliossi then drove the Chevrolet to the vicinity of the Italian-American Veterans Club (Tr. 177). Shortly after 2 p.m. petitioner left that same club with another individual and drove to a waterfront area. There he was observed seated in the front seat of his parked vehicle counting money (Tr. 106-107).

The informant, Feinberg, did not testify at petitioner's trial, either as a prosecution or a defense witness. He was interviewed by counsel for co-defendant Fragliossi prior to trial; petitioner's counsel had refused offers of a similar interview (Tr. 56, 87, 202). Notwithstanding the fact that his identity had been revealed, Feinberg steadfastly refused to testify either at the grand jury proceedings or as a government witness at prosecutions arising because of his services (A. 97-98), and threatened to perjure himself if called as a witness.[2]

Petitioner's trial, which began on September 25, 1972, was the first of three involving narcotics transactions

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[2] At the Cuomo-John Rizzo, Jr. trial, two Assistant United States Attorneys testified that on two occasions before petitioner's trial Feinberg had threatened to commit perjury if his identity were disclosed. Feinberg explained to them that he would perjure himself rather than face the defendants (C. 1428-1444, 1402, 1512).

with Feinberg. On September 27, 1972, Feinberg appeared at the office of an attorney not connected with petitioner's prosecution and gave a tape recorded statement to the effect that he had "framed" all of the defendants involved in the three cases (A. 54-67). Neither the court nor counsel were made aware of this statement during petitioner's trial, which ended on that date.

Five days later, as the government prepared to present its evidence in the prosecution of the second of the three cases involving Feinberg as an informant (*United States* v. *Ralph Cuomo and John Rizzo, Jr.*), the prosecutor and petitioner's counsel (who also represented John Rizzo, Jr.) were made aware of the tape recording, and promptly notified the court.

Thereafter, petitioner filed a motion for a new trial, claiming that the prosecution had suppressed exculpatory evidence. Particular reliance was placed on Feinberg's unsubstantiated claim that he told the prosecution that it was all a lie and that the heroin transaction had never taken place (C. 1246-1248, 1254-1255). The trial judge presided at two subsequent and similar narcotics trials involving Feinberg and heard the exculpatory testimony of Feinberg (C. 1107-1376) in these trials, both of which nevertheless resulted in guilty verdicts. He denied petitioner's post-trial motion. In his memorandum opinion (Pet. App. B), Judge Pierce stated that he had heard Feinberg's testimony in the two similar trials, noted that two juries had rejected him as a credible witness, and concluded that no harm to petitioner had resulted from any non-disclosure of Feinberg's statements and that it would not have changed the verdict.

1. Petitioner contends that the government suppressed exculpatory evidence favorable to the defense

in violation of *Brady* v. *Maryland,* 373 U.S. 83. Feinberg's statements can in no way be deemed "exculpatory" within the meaning of *Brady.* They consist of a refusal to testify on behalf of the prosecution (A. 97-98) and threats to give perjured testimony if called as a witness (C. 1428-1444, 1502, 1512). Despite Feinberg's claim that he had told the prosecutors that he had framed the petitioner, when asked if he had told the prosecutors that he would testify for the defendants and say that the heroin transaction had not taken place, Feinberg answered "No " (C. 1346).

Moreover, a new trial is not warranted even if such statements could, in some manner, be considered exculpatory. A new trial will not be granted unless the evidence is material and would likely have changed the verdict. *Giglio* v. *United States,* 405 U.S. 150, 154. The trial judge in this case determined that Feinberg's statements would likely have had no effect on the verdict and the fact that convictions were obtained in two subsequent and similar trials notwithstanding Feinberg's testimony in those trials provides ample justification for this conclusion.

2. Petitioner contends that the prosecution failed to fully disclose the extent of consideration given in its bargain with informant Feinberg, principally relying on *Giglio* v. *United States, supra.* At trial, agent Vecchione testified on cross-examination that Feinberg was paid for his services as an informant. Asked by counsel for co-defendant Fragliossi whether Feinberg had received any other "consideration," the agent replied that he was unaware of any. Counsel then asked whether Vecchione was familiar with a State narcotics prosecution against Feinberg, but the prosecutor's objection to the question was sustained. Counsel stated, "I think a yes or no answer would be more than sufficient

for purposes of this examination." The court reiterated that the objection had been sustained (Tr. 66-67), and counsel dropped the matter.

Petitioner now claims that the government intentionally suppressed information regarding the receipt by Feinberg of additional consideration in the nature of postponements of his sentencing in the State court with the hope of leniency in exchange for his cooperations as a federal informant. Petitioner points to circumstances in the *Cuomo* case to support his allegation (Pet. 17-18). To the contrary, the record in the *Cuomo* case does not support this speculative argument. There, testimony was adduced that at the time Feinberg aided the government he had not been sentenced, and that Vecchione had sought to obtain a postponement not for the purpose of rewarding Feinberg, but because Feinberg's services were useful only so long as he was out of jail (C. 107). The record contains no foundation for a claim that postponement for the sake of later leniency was a conscious part of the bargain between Feinberg and the government agent. Moreover, since Feinberg was available to defense counsel before and during trial for interviewing as to the extent of the rewards he had received, and since the jury had already been informed that Feinberg was a mercenary rather than a penitent, the inability to pursue the matter of additional benefits to Feinberg, even if error, was not prejudicial under the *Brady* doctrine. *United States* v. *Akin,* 464 F. 2d 7 (C.A. 8), certiorari denied, 409 U.S. 981; *United States* v. *Bonanno,* 430 F. 2d 1060 (C.A. 2), certiorari denied, 400 U.S. 964. *Giglio* reaffirmed this requirement of materiality and this Court only granted a new trial there because the government's case depended almost solely on the testimony of one key witness and the prosecution failed to disclose that he had been promised immunity from prosecution in return for his testimony.

3. The claim that the government somehow manipulated the Second Circuit's own rules regarding the disposition of criminal cases (Pet. 24) has been rejected by that court of appeals, and does not warrant further review. Insofar as petitioner urges under the same facts a denial of a speedy trial, his assertion is equally insubstantial, particularly since the district court specifically found that he suffered no prejudice (Pet. App. B). The record shows that petitioner's counsel had obtained continuances which adjourned the day of trial from October 26, 1971 to May 1, 1972. On April 28, 1972 the prosecution sought a continuance on the ground that Feinberg, who was at that time deemed a material witness, was still involved in undercover work, and that a disclosure of his identity at that time would abort those investigations. A sealed affidavit in support of the government's motion was furnished the court. Petitioner's counsel, Mr. Edelbaum, was not personally present at the April 28 hearing; his representative offered no objection, but indicated that because of other commitments and vacation plans by Mr. Edelbaum, any postponement would have to be for a period of ninety days. Accordingly, the court granted a continuance until September 25, 1972. On that day trial began (H. 3-15). In light of the brief length of the delay, the justifiable reasons therefor, the absence of a demand by petitioner for trial, and no meaningful showing of prejudice, the claim premised upon the Sixth Amendment's right to a speedy trial should be rejected. *Barker* v. *Wingo,* 407 U.S. 514; *United States* v. *Cuomo,* decided May 31, 1973 (C.A. 2, Nos. 73-1063, 73-1072, slip op., p. 3873).

4. As heretofore detailed, the evidence, read in the light most favorable to the government, was sufficient to support the jury's conclusion that petitioner had

participated in the heroin transaction and was not merely an unknowing helpmate and courier. See *United States* v. *Terrell*, 474 F. 2d 872 (C.A. 2).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.